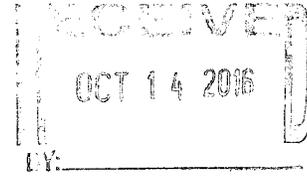


ILLINOIS INDEPENDENT TAX TRIBUNAL



MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

Case No. 16 TT 174

Judge Brian F. Barov

NOTICE OF MOTION FOR
SUMMARY JUDGMENT
SUBMITTED BY PETITIONER
MERCK SHARP & DOHME CORP.

To: Daniel A. Edelstein
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

PLEASE TAKE NOTICE that on October 13, 2016, Petitioner, Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) (“Schering”), by and through its undersigned counsel, Alston & Bird LLP, filed the enclosed Motion for Summary Judgment, Statement of Undisputed Material Facts, Certification of Richard C. Kariss, and Memorandum of Law with the Illinois Independent Tax Tribunal at 160 N. LaSalle St. Room N506, Chicago, Illinois 60601. Respondent, the Illinois Department of Revenue, has not agreed to Schering’s Motion for Summary Judgment.

PLEASE TAKE FURTHER NOTICE that Schering requests an oral argument.

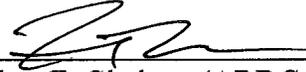
Dated: October 13, 2016

Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)



Richard C. Kariss (ARDC No. 6323078)
90 Park Avenue
New York, NY 10016
(212) 210-9452
richard.kariss@alston.com



Zachry T. Gladney (ARDC No. 6323077)
90 Park Avenue
New York, NY 10016
(212) 210-9423
zach.gladney@alston.com

ILLINOIS INDEPENDENT TAX TRIBUNAL

MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

OCT 14 2016
BY: _____

Case No. 16 TT 174

Judge Brian F. Barov

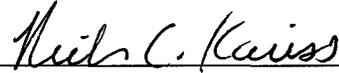
MOTION FOR SUMMARY
JUDGMENT SUBMITTED BY
PETITIONER MERCK SHARP &
DOHME CORP.

Petitioner, Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) (“Schering”), by and through its undersigned counsel, Alston & Bird LLP, hereby moves pursuant to 735 ILCS 5/2-1005 and Ill. Admin. Code tit. 86, § 5000.315, for summary judgment declaring and adjudging that the notice of deficiency upon which this controversy is based, and any tax, interest and penalties asserted therein, are invalid under 35 ILCS 5/906. In support of this Motion, Schering shall rely upon the accompanying Memorandum of Law, Statement of Undisputed Material Facts, and Certification of Richard C. Kariss, which are filed simultaneously herewith.

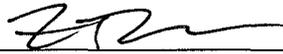
Dated: October 13, 2016

Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)



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ILLINOIS INDEPENDENT TAX TRIBUNAL

OCT 14 2016

MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

Case No. 16 FT 174

Judge Brian F. Barov

MEMORANDUM OF LAW IN
SUPPORT OF PETITIONER'S
MOTION FOR SUMMARY
JUDGMENT

STATEMENT OF THE CASE

The Illinois Department of Revenue (the "Department") conducted an income tax audit of Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) ("Schering") with respect to the tax year ended December 31, 2000 (the "Tax Year"). As a result of the audit, the Department issued a notice of deficiency (the "Original Notice") for the Tax Year through which it assessed \$1,679,125.00 of income tax, \$875,440.00 of personal property tax replacement income tax (hereinafter, referred to collectively as "Tax"), plus interest and late-filing penalties. Certification of Richard C. Kariss ("Kariss Cert."), Exhibit ("Exh.") 1. Schering protested the Original Notice by filing a timely petition with the Illinois Independent Tax Tribunal (the "Tribunal") on May 18, 2016. Kariss Cert., Exh. 2. Schering's petition was accepted by the Tribunal on May 20, 2016. Kariss Cert., Exh. 3.

The Department subsequently issued a second notice of deficiency, dated July 26, 2016 (the "Notice"), with respect to the Tax Year for the purpose of asserting new penalties under statutory provision 35 ILCS 735/3-3(b-10)(1), which is separate from the penalty provision

asserted in the Original Notice. Kariss Cert., Exh. 4. The Department also asserted in the second Notice the same Tax liability on the same legal bases as those asserted in the Original Notice. Kariss Cert., Exh. 4. Through its Motion for Summary Judgment, Schering respectfully requests that this Tribunal strike the Notice as void *ab initio* because the Department is barred from issuing a further or additional notice of deficiency for the Tax Year under 35 ILCS 5/906.

ARGUMENT

Section 906 of the Illinois Income Tax Act provides that if the Department has issued a notice of deficiency that is final with respect to a taxable year, the Department is barred from issuing a further or additional notice of deficiency for such taxable year. The Department issued the Original Notice to Schering as its final decision with respect to the Tax Year and the Original Notice was properly appealed by Schering to this Tribunal. Kariss Cert., Exhs. 1-3. The Department then issued the additional Notice for the Tax Year as prohibited by 35 ILCS 5/906. Kariss Cert., Exh. 4. Thus, the sole issue in this Motion is whether the Department's second Notice is void *ab initio* pursuant to 35 ILCS 5/906.

Although the language of 35 ILCS 5/906 predates the formation of the Tribunal, Illinois law has recognized that the finality of an agency decision is synonymous with jurisdiction. See 735 ILCS 5/3-101 (A decision is final when it “terminates the proceedings before the administrative agency.”). When 35 ILCS 5/906 was enacted, protests were initially filed with the Department and subject to administrative review within the Department (“Departmental Appeals”). See 35 ILCS 5/908(a). Thus, under the former procedure the Department retained jurisdiction in Departmental Appeals and was provided an opportunity to reconsider its own audit findings and revise the taxpayer's liability before the notice of deficiency was considered final. See Ill. Admin Code tit. 86, § 200.101 et seq. However, after the Department relinquished

jurisdiction over a taxpayer's petition by issuing a final decision, any further review of the Department's assessment was within the exclusive jurisdiction of the state judiciary. 35 ILCS 5/1201. Section 906 prevented the Department from modifying assessments that were no longer within its jurisdiction because such modifications would necessarily infringe the powers vested in the state's independent judiciary.

Through the Independent Tax Tribunal Act of 2012 ("ITTA"), the General Assembly repealed the Department's authority to review a taxpayer's liability after a notice of deficiency is issued and conferred the power of *de novo* review upon the Tribunal. See 35 ILCS 1010/1-65(a); 35 ILCS 1010/1-45 (providing that the Tribunal "shall have original jurisdiction over all determinations of the Department reflected on a Notice of Deficiency"). Thus, under the ITTA, a notice of deficiency is necessarily the Department's final decision regarding a taxpayer's liability when the notice is properly before the Tribunal on appeal. The Department has attempted to circumvent the Tribunal's jurisdiction and redetermine Schering's liability by issuing an additional notice of deficiency that purports to modify an original notice currently on appeal before the Tribunal. Such an attempt by the Department is improper because the authority to make a determination is vested in the Tribunal alone. See 35 ILCS 1010/1-45, 1-70(d). Accordingly, 35 ILCS 5/906 acts as an important bar preventing the Department from encroaching on the Tribunal's original jurisdiction, and thereby impairing the Tribunal's ability to function in accordance with its legislative mandate. If the Department is unsatisfied with the Tribunal's determination with regard to a notice of deficiency, the Department's only recourse is to file an appeal of the Tribunal's determination. 35 ILCS 1010/1-75(a).

The statutory prohibition under 35 ILCS 5/906 barring the Department from issuing additional notices of deficiency in Tribunal appeals is not only necessary to harmonize the statute

with Illinois law, but is also consistent with federal law regarding appeals to the United States Tax Court. Section 6212(c)(1) of the Internal Revenue Code, provides that “if the Secretary has mailed to the taxpayer a notice of deficiency . . . and the taxpayer files a petition with the Tax Court . . . the Secretary shall have no right to determine any additional deficiency of income tax for the same taxable year” It is well settled under federal law that restraining the Internal Revenue Service from issuing additional notices of deficiency once a petition has been filed is a necessary prerequisite to the Tax Court’s statutory obligation to render final decisions.¹

Like the United States Tax Court, the Tribunal is statutorily empowered to “finally decide the matters in controversy.” 35 ILCS 1010/1-70(d). However, it cannot do so if the Department is permitted to unilaterally create new controversies at any point in the dispute by issuing additional notices of deficiency.

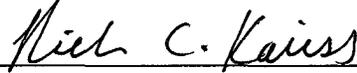
CONCLUSION

Based on the foregoing, Schering respectfully requests that this Tribunal strike the Notice as void *ab initio* because the Department is barred from issuing a further or additional notice of deficiency for the Tax Year under 35 ILCS 5/906.

¹ See, e.g., Zackim v. Comm., 887 F.2d 455 (3rd Cir. 1989) (stating that “if the taxpayer does elect to file a petition . . . his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision . . . when it has become final, whether the decision is by findings of fact and opinion, or by dismissal, as in case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. Finality is the end sought to be attained by these provisions of the bill, and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the Commissioner (save in the sole case of fraud) would be highly undesirable.”).

Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)

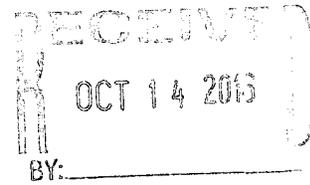


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ILLINOIS INDEPENDENT TAX TRIBUNAL



MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,
Respondent.

Case No. 16 TT 174

Judge Brian F. Barov

CERTIFICATION OF RICHARD C.
KARISS IN SUPPORT OF
PETITIONER'S MOTION
FOR SUMMARY JUDGMENT

I, Richard C. Kariss, hereby certify as follows:

1. I am a lawyer representing Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) ("Schering"). I am fully familiar with the facts of this appeal. I make this certification in support of the Motion for Summary Judgment submitted by Schering.
2. Attached hereto are true and correct copies of the following documents:
 - a. Exhibit 1 – Notice of Deficiency, dated March 22, 2016.
 - b. Exhibit 2 – Petition, dated May 17, 2016.
 - c. Exhibit 3 – Order, dated May 20, 2016.
 - d. Exhibit 4 – Notice of Deficiency, dated July 26, 2016.
 - e. Exhibit 5 – Petition, dated August 22, 2016.
 - f. Exhibit 6 – Order, dated August 29, 2016.

I certify that the above statements made by me are true and that if any of the statements are willfully false, I am subject to punishment.

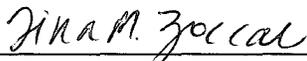
Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)



Richard C. Kariss (ARDC No. 6323078)
90 Park Avenue
New York, NY 10016
(212) 210-9452
richard.kariss@alston.com

Subscribed and sworn to before me
this 13th day of October, 2016.



Notary Public

My Commission Expires: 5/21/2019

TINA M. ZOCCALI
Notary Public, State of New York
No. 01Z06059025
Qualified in Rockland County
Commission Expires May 21, 20 19

Exhibit 1

Notice of Deficiency

for Form IL-1120, Corporation Income and Replacement Tax Return



March 22, 2016



Letter ID: CNXXXX725718X965

#BWNKMGV
#CNXX XX72 5718 X965#
MERCK SHARP & DOHME CORP
STOP
K5 3008G
2000 GALLOPING HILL RD
KENILWORTH NJ 07033-1310

Taxpayer ID: 22-1261880
Audit ID: A2109196800
Reporting period: December 2000
Total Deficiency: \$6,278,162.11
Balance due: \$6,278,162.11

We have audited your account for the reporting period listed above. The members of the combined group are jointly and severally liable for the total balance due. The attached statement explains the computation of your deficiency and the balance due. Illinois law requires that we notify you of this deficiency and your rights.

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed, but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases, file a protest with us, the Illinois Department of Revenue, within 60 days of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at tax.illinois.gov). If we do not receive your protest within 60 days, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- In any case, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due which, may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012
(217) 785-6711

cc: MERCK SHARP & DOHME CORP
ATTN: FRED O MARCUS
500 WEST MADISON ST
CHICAGO IL 60661

Bankruptcy Information

If you are currently under the protection of the Federal Bankruptcy Court, contact us and provide the bankruptcy number and the bankruptcy court. The bankruptcy automatic stay does not change the fact you are required to file tax returns.

Taxpayer Bill of Rights

- You have the right to call the Department of Revenue for help in resolving tax problems.
- You have the right to privacy and confidentiality under most tax laws.
- You have the right to respond, within specified time periods, to Department notices by asking questions, paying the amount due, or providing proof to refute the Department's findings.
- You have the right to appeal Department decisions, in many instances, within specified time periods, by asking for Department review, by filing a petition with the Illinois Independent Tax Tribunal, or by filing a complaint in circuit court.
- If you have overpaid your taxes, you have the right, within specified time periods, to file for a credit (or, in some cases, a refund) of that overpayment.

The full text of the Taxpayers' Bill of Rights is contained in the Illinois Compiled Statutes, 20 ILCS 2520/1 et seq.

Statement

Date: March 22, 2016
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1261880
Letter ID: CNXXXX725718X965

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

Computation of deficiency

Reporting period: 31-Dec-2000

Income or loss	
Federal taxable income	\$1,469,406,066.00
Net operating loss deduction	\$0.00
Income or loss	\$1,469,406,066.00
Base income or loss	
Other subtractions	\$614,023,875.00
Total subtractions	\$614,023,875.00
Base income or net loss	\$855,382,191.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$855,382,191.00
Apportionment formula	
Sales Factor	
Total everywhere	\$5,740,837,988.00
Within Illinois	\$235,016,261.00
Apportionment factor	0.040938
Business income/loss apportionable to IL	\$35,017,636.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$35,017,636.00
Net income	
Base Income or net loss	\$35,017,636.00
Approved Net Loss Carry Forward	\$0.00
Approved Net Loss Carry Back	\$0.00
IL net loss deduction (NLD) Varified	\$0.00
Standard exemption	\$41.00
Net income	\$35,017,595.00
Net replacement tax	
Replacement tax addback after apportionment	\$0.00
Replacement tax	\$875,440.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$875,440.00
Replacement tax investment credits	\$0.00

Statement

Date: March 22, 2016
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1261880
Letter ID: CNXXXX725718X965

Computation of deficiency	Reporting period: 31-Dec-2000
Net replacement tax	\$875,440.00
Net income tax	
Income tax	\$1,680,845.00
Recapture of investment credits	\$0.00
Income tax before credits	\$1,680,845.00
Income tax investment credits	\$0.00
Credit for replacement tax paid	\$1,720.00
Carryforward of credit for repl. tax paid	\$0.00
Net income tax	\$1,679,125.00
Total tax due	
Net replacement tax	\$875,440.00
Net income tax	\$1,679,125.00
Total net income and replacement tax due	\$2,554,565.00
Total tax deficiency	\$2,554,565.00
Plus late-filing penalty	\$500.00
Plus interest on tax through March 22, 2016	\$3,723,097.11
Total deficiency	* \$6,278,162.11
If you intend to pay under protest, you must pay this total deficiency amount.	

Computation of balance due	Reporting period: 31-Dec-2000
Balance due	* \$6,278,162.11

Explanation of Audit Adjustments

Income Tax



March 22, 2016

#BWNKMGV
 #CNXX X2X2 X735 76X3#
 MERCK SHARP & DOHME CORP
 STOP
 K5 3008G
 2000 GALLOPING HILL RD
 KENILWORTH NJ 07033-1310



Letter ID: CNXXX2X2X73576X3

Taxpayer ID: 22-1261880
 Account ID: 20432-61952
 Audit ID: A2109196800
 Reporting period: December 2000

Explanation of adjustments for tax period ending 12/31/2000

	<u>Income change</u>	<u>Tax impact</u>
We have determined that you were required to file an income tax return. Since you did not file a return, we have computed your Illinois Income Tax liability based on the information that we have available. [35 ILCS 5/502(a), 904(b)]	\$0.00	\$0.00
We have determined that you do not have nexus protection under PL 86-272. Any applicable income earned will be subject to apportionment and Illinois Income Tax. [35 ILCS 5/304 and 86 IL Adm. Code 100.9270]		
We determined that you and one or more of your related corporations were engaged in a unitary business during the tax years identified in this notice. Accordingly, you and the other members of the unitary business group must use combined apportionment to determine how much of your business income is taxable by Illinois. Corporations (other than S corporations) who are members of a unitary business group must file a single combined return for each year. [35 ILCS 5/304(e), 502(e), 1501(a)(27)] See attached list of the members of your unitary business group.		
We adjusted your Illinois net income or loss to correctly reflect income or loss. [35 ILCS 5/203(b), (c), (d), (e)]	\$1,024,843,677.00	\$3,062,719.00
We adjusted your Illinois net income or loss to reflect a change in your federal income or loss, which you failed to report. [35 ILCS 5/506(a), 506(b), 403(b)]	\$444,562,389.00	\$1,328,563.00
We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law. [35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]	\$614,023,875.00	-\$1,834,994.00
We adjusted your sales factor to include all business receipts on federal 1120, Lines 1 through 10, to the extent not expressly excluded from the sales factor. [86 IL Adm. Code 100.3370(a)(1)]	\$5,740,837,988.00	\$0.00
We adjusted your Illinois sales numerator to account for the Illinois destination sales of entities whose activities exceeded the protection afforded by PL 86-272.	\$235,016,261.00	\$0.00
We adjusted your replacement tax paid credit as required by Illinois law. [35 ILCS 5/201(i)]	-\$1,723.00	-\$1,723.00
Interest on tax has been computed as allowed by Illinois law. [35 ILCS 735/3-2]		

Date: March 22, 2016

Letter ID: CNXXX2X2X73576X3
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1261880
Account ID: 20432-61952
Audit ID: A2109196800
Reporting period: December 2000

Explanation of adjustments for tax period ending 12/31/2000

Income change

Tax impact

We are imposing a late-filing or nonfiling penalty because you either did not file a return by the due date (including any extensions) or filed an unprocessable return and did not correct the return to make it processable before the later of the due date of the return or 30 days after we sent you a notice that your return was unprocessable. This penalty is equal to the lesser of \$250 or 2 percent of the tax required to be shown due on your return, without regard to any payments and credits.
[35 ILCS 735/3-3(a-5)]

Because this liability qualified for amnesty, and you did not pay this liability during the amnesty period held October 1, 2003, through November 17, 2003, your applicable penalty and interest amounts were doubled.
[35 ILCS 735/3-2(f) and 3-3(i)]

Exhibit 2

ILLINOIS INDEPENDENT TAX TRIBUNAL

MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

RECEIVED
Case No. _____
BY: _____

16 11/04

PETITION

Petitioner, Merck Sharp & Dohme Corp. (f/k/a Schering Corporation), by and through its undersigned counsel, Alston & Bird LLP, respectfully alleges as follows:

THE PARTIES

1. Petitioner is Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) (“Schering”).
2. Schering’s address is 2000 Galloping Hill Road, Kenilworth, New Jersey, 07033-1310.
3. Schering’s telephone number is (908) 740-1210.
4. Schering’s taxpayer identification number is 22-1261880.
5. Respondent is the Illinois Department of Revenue (the “Department”).

JURISDICTION

6. This Tribunal has original jurisdiction over this action pursuant to 35 ILCS 1010/1-45.

BACKGROUND

7. The Department conducted an income tax audit of Schering with respect to the tax year ended December 31, 2000 (the "Tax Year").

8. As a result of the audit, the Department issued a Notice of Deficiency (the "Notice") to Schering through which the Department assessed \$1,679,125.00 of income tax, \$875,440.00 of personal property tax replacement income tax (income tax and personal property tax replacement income taxes are, together, "Tax"), interest of \$3,723,097.11, and penalty of \$500.00. A copy of the Notice is attached hereto as Exhibit A.

9. Through the Notice, the Department asserted that it is not prohibited by federal law from taxing Schering's income.

10. Through the Notice, the Department asserted that Schering and certain of Schering's subsidiary entities engaged in a unitary business in Illinois during the Tax Year.

11. Through the Notice, the Department asserted penalty and interest under 35 ILCS 735/3-2(f) and 35 ILCS 735/3-3(i).

12. Schering did not have offices, employees, agents or any other physical presence in Illinois during the Tax Year.

ERRORS OF THE DEPARTMENT OF REVENUE

Error 1

13. Through the Notice, the Department erred by concluding that it may impose Tax with respect to Schering for the Tax Year. That conclusion is in error because the Department is prohibited by federal law from taxing Schering's income. 15 U.S.C. §§ 381-384 ("P.L. 86-272"); U.S. CONST. amend. XIV; U.S. CONST. art. I, § 8, cl. 3.

Error 2

14. Through the Notice, the Department violated both the Commerce and Due Process Clauses of the United States Constitution because Schering did not engage in a unitary business in Illinois during the Tax Year. See Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992).

15. The Department's conclusion that Schering engaged in a unitary business in Illinois during the Tax Year is invalid because the Department did not develop a factual foundation to support its assertion that Schering engaged in a unitary business in Illinois during the Tax Year. See, e.g., United States v. Janis, 428 U.S. 433, 442 (1976).

Error 3

16. Through the Notice, the Department improperly determined Schering's Illinois taxable income. See 35 ILCS 5/101 et seq.

Error 4

17. Through the Notice, the Department erroneously asserted a double interest penalty under 35 ILCS 735/3-2(f) ad 3-3(i) because Schering did not have "taxes due" under 35 ILCS 745/10. See Metropolitan Life Insurance Co. v. Hamer, 966 N.E.2d 1052 (Ill. App. Ct. 2012) rev'd 990 N.E.2d 1144 (Ill. 2013).

18. The Department's improper application of a double interest penalty under 35 ILCS 735/3-2(f) and 3-3(i) violated the Due Process Clause of the United States Constitution by arbitrarily and unreasonably applying an interest penalty to a liability that was not known to Schering until after the amnesty period described in 35 ILCS 745/10 had expired.

RELIEF REQUESTED

WHEREFORE, Schering respectfully requests that this Tribunal issue a judgment against the Respondent:

19. Declaring and adjudging that all Tax assessed through the Notice, and any related interest and penalty are invalid; and

20. Granting such other and further relief, legal or equitable, as the Tribunal deems just and appropriate.

Dated: May 17, 2016

Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)



Syed Fahad Saghir (ARDC No. 6290645)
950 F Street NW
Washington, DC 20004
202-239-3220
fahad.saghir@alston.com

Exhibit 3

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

MERCK SHARP & DOHME CORP.,)	
(F/K/A SCHERING CORPORATION),)	
Petitioner,)	
)	
v.)	16 TT 103
)	Judge Brian F. Barov
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

ORDER

This order applies to the related matters of 16 TT 104, 16 TT 105 and 16 TT 106, and will be entered on the docket in those cases.

The petition in this matter has been accepted by the Tribunal, and the Department's answer is due on or before July 11, 2016. The initial status conference is set for July 26, 2016, at 9:30 a.m., by telephone.

At the initial status conference, the parties should be prepared to discuss: 1) the nature of the case; 2) factual and legal issues; 3) settlement potential and discussions to date; 4) anticipated discovery; and 5) potential motions to be filed.

s/ Brian Barov
BRIAN F. BAROV
Administrative Law Judge

Date: May 20, 2016

Exhibit 4

Notice of Deficiency
for Form IL-1120, Corporation Income and Replacement Tax Return



July 26, 2016



Letter ID: CNXXXX19783464X1

#BWNKMGV
#CNXX XX19 7834 64X1#
MERCK SHARP & DOHME CORP
STOP
K5 3008G
2000 GALLOPING HILL RD
KENILWORTH NJ 07033-1310

Taxpayer ID: 22-1261880
Audit ID: A2109196800
Reporting period: December 2000
Total Deficiency: \$7,024,199.91
Balance due: \$7,024,199.91

We have audited your account for the reporting period listed above. The members of the combined group are jointly and severally liable for the total balance due. The attached statement explains the computation of your deficiency and the balance due. This notice is an amendment to the notice we previously issued to you on March 22, 2016. Illinois law requires that we notify you of this deficiency and your rights.

If you agree to this deficiency, pay the total balance due as soon as possible to minimize penalty and interest assessed. Make your check payable to the "Illinois Department of Revenue", write your taxpayer ID on your check, and mail a copy of this notice along with your payment.

If you do not agree, you may contest this notice by following the instructions listed below.

- If the amount of this tax deficiency, exclusive of penalty and interest is more than \$15,000, or if no tax deficiency is assessed, but the total penalties and interest is more than \$15,000, file a petition with the Illinois Independent Tax Tribunal within 60 days of this notice. Your petition must be in accordance with the rules of practice and procedure provided by the Tribunal (35 ILCS 1010/1-1, et seq.).
- In all other cases, file a protest with us, the Illinois Department of Revenue, within 60 days of the date of this notice. If you file a protest on time, we must reconsider the proposed deficiency, and if requested, grant you or your authorized representative and administrative hearing. An administrative hearing is a formal legal proceeding conducted pursuant to the rules adopted by the Department and is presided over by an administrative law judge. Submit your protest on Form EAR-14, Format for Filing a Protest for Income Tax, (available on our website at tax.illinois.gov). If we do not receive your protest within 60 days, this deficiency will become final. A protest of this notice does not preserve your rights under any other notice.
- In any case, you may instead, under Sections 2a and 2a.1 of the State Officers and Employees Money Disposition Act (30 ILCS 230/2a, 230/2a.1), pay the total liability under protest using Form RR-374, Notice of Payment Under Protest (available on our website at tax.illinois.gov), and file a complaint with the circuit court for a review of our determination.

If you do not protest this notice or pay the assessment total in full, we may take collection action against you for the balance due which, may include levy of your wages and bank accounts, filing of a tax lien, or other action.

If you have questions, call us at the telephone number shown below.

Sincerely,

Constance Beard
Director

ILLINOIS DEPARTMENT OF REVENUE
AUDIT BUREAU
PO BOX 19012
SPRINGFIELD IL 62794-9012
(217) 785-6711

Statement

Date: July 26, 2016
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1261880
Letter ID: CNXXXX19783464X1

The attached EDA-27, Explanation of Adjustments, details your audit adjustments.

Computation of deficiency

Reporting period: 31-Dec-2000

Income or loss	
Federal taxable income	\$1,469,406,066.00
Net operating loss deduction	\$0.00
Income or loss	\$1,469,406,066.00
Base income or loss	
Other subtractions	\$614,023,875.00
Total subtractions	\$614,023,875.00
Base income or net loss	\$855,382,191.00
Income allocable to Illinois	
Non-business income or loss	\$0.00
Non-unitary partnership bus. income or loss	\$0.00
Business income or loss	\$855,382,191.00
Apportionment formula	
Sales Factor	
Total everywhere	\$5,740,837,988.00
Within Illinois	\$235,016,261.00
Apportionment factor	0.040938
Business income/loss apportionable to IL	\$35,017,636.00
Nonbusiness income/loss allocable to IL	\$0.00
Non-unitary part. business income app. to IL	\$0.00
Base income or net loss allocable to IL	\$35,017,636.00
Net income	
Base income or net loss	\$35,017,636.00
Approved Net Loss Carry Forward	\$0.00
Approved Net Loss Carry Back	\$0.00
IL net loss deduction (NLD) Varified	\$0.00
Standard exemption	\$41.00
Net income	\$35,017,595.00
Net replacement tax	
Replacement tax addback after apportionment	\$0.00
Replacement tax	\$875,440.00
Recapture of investment credits	\$0.00
Replacement tax before credits	\$875,440.00
Replacement tax investment credits	\$0.00

Statement

Date: July 26, 2016
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1261880
Letter ID: CNXXXX19783464X1

Computation of deficiency	Reporting period: 31-Dec-2000
Net replacement tax	\$875,440.00
Net income tax	
Income tax	\$1,680,845.00
Recapture of investment credits	\$0.00
Income tax before credits	\$1,680,845.00
Income tax investment credits	\$0.00
Credit for replacement tax paid	\$1,720.00
Carryforward of credit for repl. tax paid	\$0.00
Net income tax	\$1,679,125.00
Total tax due	
Net replacement tax	\$875,440.00
Net income tax	\$1,679,125.00
Total net income and replacement tax due	\$2,554,565.00
Total tax deficiency	\$2,554,565.00
Plus late-filing penalty	\$500.00
Plus late ES payment or underpayment penalty	\$689,732.54
Plus interest on tax through July 26, 2016	\$3,779,402.37
Total deficiency	* \$7,024,199.91
If you intend to pay under protest, you must pay this total deficiency amount.	

Computation of balance due	Reporting period: 31-Dec-2000
Balance due	* \$7,024,199.91

Explanation of Audit Adjustments

Income Tax



#BWNKMGV
#CNXX XX48 XX55 6967#
MERCK SHARP & DOHME CORP
STOP
K5 3008G
2000 GALLOPING HILL RD
KENILWORTH NJ 07033-1310

July 26, 2016



Letter ID: CNXXXX48XX556967

Taxpayer ID: 22-1261880
Account ID: 20432-61952
Audit ID: A2109196800
Reporting period: December 2000

Explanation of adjustments for tax period ending 12/31/2000

We have determined that you were required to file an income tax return. Since you did not file a return, we have computed your Illinois Income Tax liability based on the information that we have available.
[35 ILCS 5/502(a), 904(b)]

Return Impact

\$0.00

Tax impact

\$0.00

We have determined that you do not have nexus protection under PL 86-272. Any applicable income earned will be subject to apportionment and Illinois Income Tax.
[35 ILCS 5/304 and 86 IL Adm. Code 100.9270]

We determined that you and one or more of your related corporations were engaged in a unitary business during the tax years identified in this notice. Accordingly, you and the other members of the unitary business group must use combined apportionment to determine how much of your business income is taxable by Illinois. Corporations (other than S corporations) who are members of a unitary business group must file a single combined return for each year.
[35 ILCS 5/304(e), 502(e), 1501(a)(27)] See attached list of the members of your unitary business group.

We adjusted your Illinois net income or loss to correctly reflect income or loss.
[35 ILCS 5/203(b), (c), (d), (e)]

\$1,024,843,677.00

\$3,062,719.00

We adjusted your Illinois net income or loss to reflect a change in your federal income or loss, which you failed to report.
[35 ILCS 5/506(a), 506(b), 403(b)]

\$444,562,389.00

\$1,328,563.00

We adjusted your subtraction modifications for foreign dividends on Schedule J, Foreign Dividends, to reflect the correct amount as allowed by Illinois law.
[35 ILCS 5/203(b)(2)(G), (b)(2)(O), (h)]

\$614,023,875.00

-\$1,834,994.00

We adjusted your sales factor to include all business receipts on federal 1120, Lines 1 through 10, to the extent not expressly excluded from the sales factor.
[86 IL Adm. Code 100.3370(a)(1)]

\$5,740,837,988.00

\$0.00

We adjusted your Illinois sales numerator to account for the Illinois destination sales of entities whose activities exceeded the protection afforded by PL 86-272.

\$235,016,261.00

\$0.00

We adjusted your replacement tax paid credit as required by Illinois law.
[35 ILCS 5/201(i)]

-\$1,723.00

-\$1,723.00

Interest on tax has been computed as allowed by Illinois law.
[35 ILCS 735/3-2]

Date: July 26, 2016

Letter ID: CNXXXX48XX556967
Name: MERCK SHARP & DOHME CORP
Taxpayer ID: 22-1281880
Account ID: 20432-81952
Audit ID: A2109196800
Reporting period: December 2000

Explanation of adjustments for tax period ending 12/31/2000

Income change

Tax impact

We are imposing a late-filing or nonfiling penalty because you either did not file a return by the due date (including any extensions) or filed an unprocessable return and did not correct the return to make it processable before the later of the due date of the return or 30 days after we sent you a notice that your return was unprocessable. This penalty is equal to the lesser of \$250 or 2 percent of the tax required to be shown due on your return, without regard to any payments and credits.
[35 ILCS 735/3-3(a-5)]

We are imposing a late-payment penalty because you did not make your required estimated tax payments or pay the required amount of estimated tax payment by the payment due date. This penalty is based on the amount required to be shown due on your return, minus any timely payments and timely credits. This penalty is figured at increasing rates based on the number of days your payment is late. The penalty rate is 2 percent of any amount that is paid no later than 30 days after the due date; 5 percent of any amount that is paid later than 30 days but no later than 90 days after the due date; 10 percent of any amount that is paid later than 90 days but no later than 180 days after the due date; 15 percent of any amount that is paid later than 180 days after the due date. [35 ILCS 735/3-3 (b-10)(1)]

Because this liability qualified for amnesty, and you did not pay this liability during the amnesty period held October 1, 2003, through November 17, 2003, your applicable penalty and interest amounts were doubled.
[35 ILCS 735/3-2(f) and 3-3(i)]

Exhibit 5

ILLINOIS INDEPENDENT TAX TRIBUNAL

MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

RECEIVED
AUG 29 2016

Case No: _____

PETITION

16 1174

Petitioner, Merck Sharp & Dohme Corp. (f/k/a Schering Corporation), by and through its undersigned counsel, Alston & Bird LLP, respectfully alleges as follows:

THE PARTIES

1. Petitioner is Merck Sharp & Dohme Corp. (f/k/a Schering Corporation) (“Schering”).
2. Schering’s address is 2000 Galloping Hill Road, Kenilworth, New Jersey, 07033-1310.
3. Schering’s telephone number is (908) 740-1210.
4. Schering’s taxpayer identification number is 22-1261880.
5. Respondent is the Illinois Department of Revenue (the “Department”).

JURISDICTION

6. This Tribunal has original jurisdiction over this action pursuant to 35 ILCS 1010/1-45.

BACKGROUND

7. The Department conducted an income tax audit of Schering with respect to the tax year ended December 31, 2000 (the "Tax Year").

8. As a result of the audit, the Department issued a Notice of Deficiency (the "Original Notice") for the Tax Year through which it assessed \$1,679,125.00 of income tax, \$875,440.00 of personal property tax replacement income tax (hereinafter, referred to collectively as "Tax"), interest of \$3,723,097.11, and penalty of \$500.00. A copy of the Original Notice is attached hereto as Exhibit A.

9. Schering filed a petition with the Illinois Independent Tax Tribunal (the "Tribunal") protesting the Original Notice on May 18, 2016. Through its order dated May 20, 2016 (the "Order"), the Tribunal accepted Schering's petition with respect to the Original Notice. A copy of the Order is attached hereto as Exhibit B.

10. On July 26, 2016, the Department issued a second Notice of Deficiency (the "Notice") for the Tax Year through which it asserted \$1,679,125.00 of income tax, \$875,440.00 of personal property tax replacement income tax, interest of \$3,779,402.37, and penalties of \$690,232.54. The Notice is attached hereto as Exhibit C.

11. Through the Notice, the Department asserted additional Tax, interest, and penalties for the Tax Year on the same bases as it assessed Tax, interest, and penalties through the Original Notice, but also asserted a late payment or underpayment penalty for the first time under 35 ILCS 735/3-3(b-10)(1).

12. Through the Notice, the Department asserted that it is not prohibited by federal law from taxing Schering's income.

13. Through the Notice, the Department asserted that Schering and certain of Schering's subsidiary entities engaged in a unitary business in Illinois during the Tax Year.

14. Schering did not have offices, employees, agents or any other physical presence in Illinois during the Tax Year.

ERRORS OF THE DEPARTMENT OF REVENUE

Error 1

15. Through the Notice, the Department violated Illinois law because the Department is barred from issuing a further or additional notice of deficiency for the Tax Year under 35 ILCS 5/906.

16. Because the Department is barred from issuing a further or additional notice of deficiency for the Tax Year under 35 ILCS 5/906 the Notice is void *ab initio* and should therefore be stricken.

Error 2

17. Through the Notice, the Department erroneously asserted late payment or underpayment, late-filing, and double penalties under 35 ILCS 735/3-3(a-5), (b-10)(1) and (i) because Schering had reasonable cause for not filing tax returns or making tax payments by the payment due dates. 35 ILCS 735/3-8; Ill. Admin. Code § 700.400; see Security Life of Denver Insurance Company v. Illinois Department of Revenue, 14 TT 89 (Ill. Indep. Tax Tribunal 2016).

18. The Department's improper application of late payment or underpayment, late-filing, and double penalties under 35 ILCS 735/3-3(a-5), (b-10)(1) and (i) violated the Due Process Clause of the United States Constitution by arbitrarily and unreasonably penalizing Schering for a tax liability that was not known to Schering through no fault of its own and despite Schering's exercise of good faith in determining its tax liability. 35 ILCS 735/3-8; Ill. Admin. Code § 700.400;

see Security Life of Denver Insurance Company v. Illinois Department of Revenue, 14 TT 89 (Ill. Indep. Tax Tribunal 2016).

Error 3

19. Through the Notice, the Department erroneously asserted double interest and double penalties under 35 ILCS 735/3-2(f) and 3-3(i) because Schering did not have “taxes due” under 35 ILCS 745/10. See Metropolitan Life Insurance Co. v. Hamer, 966 N.E.2d 1052 (Ill. App. Ct. 2012) rev’d 990 N.E.2d 1144 (Ill. 2013).

20. The Department’s improper application of double interest and double penalties under 35 ILCS 735/3-2(f) and 3-3(i) violated the Due Process Clause of the United States Constitution by arbitrarily and unreasonably penalizing Schering for a tax liability that was not known to Schering until after the amnesty period described in 35 ILCS 745/10 had expired.

Error 4

21. Through the Notice, the Department erred by concluding that it may impose Tax with respect to Schering for the Tax Year. That conclusion is in error because the Department is prohibited by federal law from taxing Schering’s income. 15 U.S.C. §§ 381-384 (“P.L. 86-272”); U.S. CONST. amend. XIV; U.S. CONST. art. I, § 8, cl. 3.

Error 5

22. Through the Notice, the Department violated both the Commerce and Due Process Clauses of the United States Constitution because Schering did not engage in a unitary business in Illinois during the Tax Year. See Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768 (1992).

23. The Department’s conclusion that Schering engaged in a unitary business in Illinois during the Tax Year is also invalid because the Department did not develop a factual foundation

to support its assertion that Schering engaged in a unitary business in Illinois during the Tax Year.
See, e.g., United States v. Janis, 428 U.S. 433, 442 (1976).

Error 6

24. Through the Notice, the Department improperly determined Schering's Illinois taxable income. See 35 ILCS 5/101 et seq.

RELIEF REQUESTED

WHEREFORE, Schering respectfully requests that this Tribunal issue a judgment against the Respondent:

25. Striking the Notice as invalid;

26. Declaring and adjudging that all Tax, penalties, and interest asserted through the Notice are invalid; and

27. Granting such other and further relief, legal or equitable, as the Tribunal deems just and appropriate.

Dated: August 22, 2016

Respectfully submitted,

ALSTON & BIRD LLP
Counsel for Plaintiff,
Merck Sharp & Dohme Corp.
(f/k/a Schering Corporation)



Syed Fahad Saghir (ARDC No. 6290645)
950 F Street NW
Washington, DC 20004
202-239-3220
fahad.saghir@alston.com

Exhibit 6

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

MERCK SHARP & DOHME CORP.,)	
(F/K/A SCHERING CORPORATION),)	
Petitioner,)	
)	
)	
v.)	16 TT 174
)	Judge Brian F. Barov
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

ORDER

The petition in this matter has been accepted by the Tribunal, and the Department's answer is due on or before September 30, 2016. The initial status conference is set for October 6, 2016, at 3:00 p.m., CST, by telephone.

At the initial status conference, the parties should be prepared to discuss: 1) the nature of the case; 2) factual and legal issues; 3) settlement potential and discussions to date; 4) anticipated discovery; and 5) potential motions to be filed.

s/ Brian Barov
BRIAN F. BAROV
Administrative Law Judge

Date: August 29, 2016

ILLINOIS INDEPENDENT TAX TRIBUNAL

OCT 14 2016
BY: _____

MERCK SHARP & DOHME CORP.
(F/K/A SCHERING CORPORATION),

Petitioner

-v.-

ILLINOIS DEPARTMENT OF REVENUE,

Respondent.

Case No. 16 TT 174

Judge Brian F. Barov

PROOF OF SERVICE

On October 13, 2016, I, the undersigned, caused a copy of the within Notice of Motion, Motion for Summary Judgment, Statement of Undisputed Material Facts, Certification of Richard C. Kariss, and Memorandum of Law to be served upon the Respondent by United Parcel Service, Overnight Delivery, at the following address:

Daniel A. Edelstein
Special Assistant Attorney General
Illinois Department of Revenue
Office of Legal Services
100 W. Randolph St., 7-900
Chicago, IL 60601

Dated: October 13, 2016



Zachry T. Gladney
Alston & Bird LLP